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Commonwealth of Kentucky
Supreme Court

Case No. 2014-SC-000242-DR

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DAVID DESHIELDS — APPELLANT

v.

Appeal from McCracken Circuit Court
Hon. Timothy Kaltenbach, Chief Circuit Judge
Indictment No. 2009-CR-00547

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR COMMONWEALTH

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief for the Commonwealth was mailed 1st class U.S. mail, postage prepaid this the 10th day of August, 2015, to: Hon. Timothy Kaltenbach, Chief Circuit Judge, McCracken County Courthouse, 301 S. Sixth Street, Paducah, Kentucky 42003; via state-messenger mail to: Hon. Meredith Krause, Assistant Public Advocate, Department of Public Advocacy, Suite 501, 200 Fair Oaks Lane, Frankfort, Kentucky 40601; and by agreement via electronic mail to Hon. Daniel Boaz. McCracken County Courthouse, 301 South Sixth Street, Paducah, Kentucky 42003-1794. I further certify that the record on appeal was returned to the Clerk of this Court on the same day.

CHRISTIAN K. R. MILLER
Assistant Attorney General

INTRODUCTION

David DeShields entered a guilty plea to sex crimes and later filed a Motion to Amend his sentence, which was denied and appealed. Following the Court of Appeals's affirmance of that denial, DeShields sought and was granted discretionary review on two issues.

ORAL ARGUMENT STATEMENT

The Commonwealth does not request oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On December 4, 2009, the McCracken County Grand Jury indicted DeShields on two counts of First-Degree Sexual Abuse, Victim Under 12, for crimes committed against the same victim between March 2009 and October 6, 2009. (TR 1). The victim was the daughter of DeShields's wife. (TR 33). DeShields's wife confronted DeShields after her daughter told her that DeShields was molesting the victim at night. (TR 14). DeShields admitted to the acts then packed a bag and left the house. (*Ibid.*).

The wife then was interviewed by the McCracken County Sheriff's Department and placed a controlled telephone call to DeShields's cell phone. (TR 14). A summary of the phone exchange was recorded:

[Wife]: Are you going to do something stupid?

[DeShields]: I honestly don't know

[Wife]: Why did you do it?

[DeShields]: That's the reason I want to kill myself! I don't know

[Wife]: If you kill yourself you'll go to hell

[DeShields]: I'm already going

. . .

[Wife]: How many times did you go in there

[DeShields]: Once

[Wife]: Why?

[DeShields]: Your [sic] asking the same question I asked myself and that the reason I want to kill myself

. . .

[Wife]: . . . [the victim] asked L[.] if her daddy touches her pee pee L[.] to her no to tell her mom

[Wife]: We already know it happened though

[DeShields]: Yeah I know

[Wife]: If you commit you go to hell

[DeShields]: Right now the way I'm feeling I deserve it

[DeShields]: I can never look at anyone I know in the face again

[Wife]: Are you going to get help

[DeShields]: Yes, I'm going to get help

[Wife]: So you don't do this to [the victim] again. You promise you'll never do it to [the victim] again?

[DeShields]: I wanted to kill myself over what happened.

[DeShields]: It will never happen again I promise

(TR 14-15).

DeShields was then arrested and interviewed by the McCracken County Sheriff's Department on October 6, 2009. (TR 13, 15). DeShields "[s]tated that the first time he had inappropriate contact with [the victim] was approximately five months ago." (TR 15). DeShields "[s]tate[d] that the first time it occurred [the victim] was in bed with him in his father's room." (TR 15). DeShields "[s]tated that he rubbed her on top of her panties on her private area." (TR 15). DeShields "[s]tated the last time it occurred was

approximately two weeks ago." (TR 15). DeShields "[s]tated that he just grabbed her legs and spread them apart." (TR 15). DeShields "[s]tated that he just looked and barely touched her after he pulled down her panties." (TR 15). DeShields "[s]tated that after he pulled down her shorts and panties he only touched her vaginal area for approximately 30 seconds." (TR 15).

DeShields ultimately accepted the Commonwealth's offer to serve two, concurrent, six-year imprisonment sentences in exchange for guilty pleas to two counts of First-Degree Sexual Abuse, Victim Under 12. (TR 68). During his guilty plea he was informed by the trial court that he would be subject to a five-year conditional discharge. (VR 9/10/10, 14:40:30). On November 4, 2010, a Judgment and Sentence was entered following the Commonwealth's recommended sentence. The judgment and sentence also stated, "Upon discharge, a mandatory five (5) year conditional discharge, KRS 532.043, is required for all sex offenders." (TR 75).

On July 13, 2012, DeShields, *pro se*, filed a Motion to Amend Sentence, citing no procedural rule for bringing such motion. In the motion he argued the five-year conditional discharge violated Due Process under *Apprendi* (because a jury did not find him guilty of the enhanced sentence), and Double Jeopardy:

> There are a great number of cases in which said courts of superior jurisdiction have held that any enhancement to the statutory length of a sentence, such as this conditional discharge must be presented in an indictment, tried by a jury, and the

enhancement must be levied by the jury after finding guilt beyond a reasonable doubt. This is keeping with the "Due Process Clause" of the U.S. Constitution as enumerated in the 5th Amendment and the jury trial guarantee of the 6th Amendment. wherein the courts have decreed that . . . "any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt . . ."

The movant David DeShields was sentenced to 6 years in prison upon a plea bargain of the offense of sexual abuse 1st deg. u/12 years of age and was further sentenced to 5 years conditional discharge. which is unconstitutional and must be removed from the movant's sentence.

Likewise, the U.S. Constitution, 14th Amendment, provides for the pro-scription of any deprivation of liberty without due process of law and the U.S. 14th Amendment guarantees that in all criminal pros-ecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. It has also been decreed that it is "un-constitutional for legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."

The plain language of KRS 532.070(2) states that the statute can be used to modify a sentence "fixed by a jury" pursuant to KRS 532.060. "The literal language of the statute is both clear and un-ambiguous and must be given effect as written." Commonwealth vs. Harrelson, Ky., 902 S.W.2d 813 (1995). Therefore, KRS 532.070(2) can be applied by a trial judge where a sentence of five (5) years for a class D felony is fixed by a jury, and only where it is fixed by a jury.

The Court of Appeals in Commonwealth v. Doughty, Ky. App., 869 S.W.2d 53 (1994) has previously held that KRS 532.070(1)

could be applied to a sentence recommended by the Commonwealth in a plea agreement, as well as in a sentence fixed by a jury. Review of that decision was not sought in the Kentucky Supreme Court, nor had the court previously considered this issue. In Doughty, the court noted that the statutory language was clear, but that the primary purpose of the legislation ameliorative, thus the court of appeals could see "no logic" in allowing a trial judge to ameliorate a sentence by a jury which he regards as too harsh but not to provide that latitude when the recommended sentence comes by way of a plea bargain. While the Court agrees that the statute is clear, i.e., that the statute applies only where a jury sets the sentence, and that the purpose of the statute is ameliorative, the supreme court is to follow the plain language of the statute and the intent of the legislature, if not the logic. Assessing the wisdom of legislative action is not within the purview of the judiciary. Commonwealth v. Allen, Ky. 980 S.W.2d 278, 281 (1998). The language of the statute is very clear and to the extent that Commonwealth v. Doughty, Ky. appeals., 869 S.W.2d 53 (1994) allowed KRS 532.070(2) to be utilized where sentencing was fixed other than by a jury, that case was thereby overruled.

KRS 532.070(1) allows a trial judge to modify a sentence fixed by a jury for a felony conviction which the trial judge believes to be too harsh, based, as in subsection (2), on the nature and circumstances of the crime and the history and character of the defendant, and to fix a sentence within the penalties range permissible for the crime of which the defendant has been convicted. KRS 532.070(2) allows for modification by the trial judge where the defendant is convicted of a class D felony, and allows the trial judge to sentence the defendant to up to one (1) year in jail, rather than 1 to 5 years in prison. Both provisions seek to ameliorate a sentence which the judge believes to be unduly harsh. As the Supreme Court recognized in Smith v. Commonwealth, Ky., 806 S.W.2d 647 (1991), it is improper for a

trial judge to use these provisions to "impose a more onerous penalty in benignant guise. Id. at 648.

In Smith, the defendant was convicted of rape in the first degree and sodomy in the first degree. The jury fixed a sentence of life in prison on each offense. The trial court, however, sentenced Smith to 2 consecutive 25 year terms, for a total of 50 years in prison. Smith asserted on appeal that the trial court's modification of his sentence was unauthorized as it resulted in a sentence which was more severe than that fixed by the jury.

Under parole disability legislation at the time, the sentence fixed by the jury would have resulted in Smith being eligible for parole after 12-years, while the sentence imposed by the trial court resulted in Smith being eligible for parole after 25-years, resulting in an effective sentence of 25 to 50 years. The Supreme Court in Smith recognized that the sentence set by the trial court was mroe severe than that fixed by the jury. That sentence was also vacated and remanded to the trial court for resentencing in conformity with its opinion.

In the case of Apprendi v. New Jersey, 120 S.Ct. 2348, Justice Stephens of the United States Supreme Court held that the 14th Amendment's Due Process clause has required all the foregoing constrictions. This case at bar must be treated as proven herein. The conditional discharge portion must be removed from the movant's sentence as unconstitutional.

The constitutional right not be placed in double jeopardy being a vital safeguard in American society, should not be given a narrow, grudging application. Green v. U.S., 355 U.S. 184 2 LEd2d 199, 87 SCt 221 (1961). Double Jeopardy clause held to prohibit state from sentencing defendant multiple times for one offense. North Carolina v. Pearce, 395 U.S. 711, 23 LEd2d 656, 89 S.Ct. 2072 (1969).

> Common sense, you cannot sentence a, Class D felony, defendant to 2,3, 4, or 5 years in prison and then sentence him to yet another 5 years for same crime which exceeds the statutory 5 year maximum sentence for a class D felony, as is done with the conditional discharge. See U.S. v. Baugh, 787 F2d 1131 (7th Cir. 1986). The language in Baugh, relates to any conditional discharge. Double Jeopardy ordinarily attaches upon court's acceptance of a plea agreement. Once defendant tenders prima facie double jeopardy claim, burden of persuasion shifts to government. U.S. v. Harrison, 918 F2d 469 (5th Cir. 1990).
>
> Wherefore, movant moves this Court to remove the conditional discharge portion of his sentence.

(TR 82-86).

Following the Commonwealth's response, (TR 96), the trial court entered a summary order on July 23, 2012 denying the motion. (TR 98). DeShields timely filed motions to proceed *in forma pauperis* and for appointment of counsel, and timely tendered a notice of appeal. (TR 100-111).

On appeal to the Court of Appeals, DeShields claimed a Fair Warning violation allegedly occurred because the statutory and administrative revocation procedures for conditional discharges had changed.

On April 4, 2014, the Court of Appeals issued one opinion on the three consolidated cases of *Martin, DeShields, and McDaniel*, affirming all three trial court opinions. Initially, in deciding what standard of review to utilize, the court held that the Motion to Amend Sentence was an RCr 11.42 motion. (Slip Op. at 3-4).

The court then addressed the conditional discharge "due process" claim, and found none had occurred. (Slip Op. at 4-6).

DeShields then filed a motion for discretionary review with this Court. He raised two claims: (1) can the Court of Appeals construe an un-characterized "Motion to Amend Sentence" as an RCr 11.42 motion?; and (2) does a defendant suffer a Fair Warning violation when the legislature alters the revocation proceedings for a sex offender's conditional discharge?

This Court granted discretionary review on both issues.

Any additional facts are discussed as necessary below.

ARGUMENT

Two issues are raised on appeal. Both issues should be summarily denied as DeShields's Motion to Amend Sentence was not ripe for review. Following the ripeness issue, the Commonwealth responds to DeShields's claims.

I. The Motion to Amend Sentence was not ripe for review.

DeShields's appeal is not properly before this Court because his motion raised an issue that was not ripe. Ripeness may be raised at any time, as it concerns the justiciability of a claim:

> The issue of ripeness has not been raised heretofore, but is an element of a justiciable motion or claim. "Questions that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy. Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it."

Nordike v. Nordike, 231 S.W.3d 733, 739-740 (Ky. 2007) (quoting *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005)). *See also W.B. v. Comm., Cabinet for Health and Family Services*, 388 S.W.3d 108 (Ky. 2012) (court can raise ripeness claim *sua sponte*).

Ripe claims require a live case or controversy, not a potential or hypothetical controversy. ". . . [T]he ripeness doctrine requires the judiciary to refrain from giving advisory opinions on hypothetical issues." *Associated*

Industries of Ky. v. Commonwealth, 912 S.W.2d 947, 951 (Ky. 1995) (citing *United States v. Fruehauf*, 365 U.S. 146 (1961)).

Here, DeShields was serving a six-year imprisonment sentence. When he filed his motion in circuit court, he was still in prison. At the time of writing this brief it appears DeShields is still in prison serving his sentence. At no point has he been released on a conditional discharge. And, more importantly to his underlying claim, at no point have revocation proceedings been instituted against DeShields's conditional discharge, nor has DeShields been revoked from his conditional discharge.

DeShields's underlying claim involves only the revocation proceedings for conditional discharges. However, DeShields may never be subject to the revocation proceedings, and even if he were, he may never be revoked from his conditional discharge. He may never even serve his conditional discharge, as he could die, obtain additional years of imprisonment, abscond from the country, or have any of myriad other circumstances occur in the interim. Furthermore, the revocation procedures in place when and if DeShields is ever revoked may be substantially different than they currently are.

"Questions that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy." *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005) (*citing Curry v. Coyne*, 992 S.W.2d 858, 860 (Ky. App. 1998)). "Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it." *Ibid.*

Because DeShields's motion concerned an unripe, non-justiciable, hypothetical issue, the trial court lacked subject matter jurisdiction to render an order. Two panels of the Court of Appeals have reached the same conclusion in separate cases regarding motions similar to DeShields's. *Rothfuss v. Commonwealth*, 2015 WL 3826007 (Ky. App. 2015); *Gosnell v. Commonwealth*, 2014 WL 3721282 (Ky. App. 2014). DeShields's panel should have reached the same result on his hypothetical issue. The Court of Appeals's opinion and the trial court's order should be vacated as the issue is not ripe for review.

II. Procedural posture of the Motion to Amend Sentence.

DeShields first claims his motion should be reviewed as a CR 60.02 motion, not an RCr 11.42 motion as the Court of Appeals found. In spite of this assertion, DeShields concedes his claim could be appropriately raised under RCr 11.42. Aplt's Brf. at 10. He also concedes his motion did not cite a procedural rule under which he was requesting relief. Aplt's Brf. at 7. Thus, his motion is an un-labeled and un-characterized motion. He argues his intention, which was first expressed in his Reply brief at the Court of Appeals, was to file a CR 60.02 motion, and claims the Court of Appeals should have discerned that alleged intention and reviewed his claim as such.

The problem with DeShields's CR 60.02 claim is primarily thus – his motion requested RCr 11.42 relief. His motion raised an *Apprendi*/Due Process claim. This claim is most appropriately raised on direct appeal or in

RCr 11.42 *See Vaughn v. Commonwealth*, 258 S.W.3d 435 (Ky. App. 2008) (RCr 11.42 motion); *Meece v. Commonwealth*, 348 S.W.3d 627 (Ky. 2011) (direct appeal); *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010) (direct appeal). *Compare*, *Bowling v. Commonwealth*, 163 S.W.3d 361, 377-378, fn 22 (Ky. 2005) (deciding *Apprendi* issue in CR 60.03 claim only because *Apprendi* rendered 10 years after Bowling's judgment and sentence). Because his motion raised an RCr 11.42 claim, the Court of Appeals properly reviewed it under that standard.

As this Court announced decades ago, Kentucky follows a non-haphazard and non-overlapping structure for attacking the final judgment in a criminal cases. "That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (emphasis in original). "CR 60.02 is not intended merely as an additional opportunity to raise [constitutional] defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42." *Ibid.*

Gross is explicit that the post-conviction appeals order is (1) direct appeal; (2) RCr 11.42; (3) CR 60.02:

> We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.

> Next, we hold that a defendant is *required* to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him.

Gross, 648 S.W.2d at 857 (emphasis added).

Because direct appeals and RCr 11.42 motions should be filed before CR 60.02 motions, a defendant is "foreclose[d] . . . from raising any questions under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings." *Ibid.* If there were no order to the post-conviction appellate process, a defendant would not be barred from raising such claims in his CR 60.02 motion. *See Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014) ("Similarly, CR 60.02 does not permit successive post-judgment motions, and the rule may be utilized only in extraordinary situations when relief is not available on direct appeal or under RCr 11.42.") (*citing McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997)).

Why close off issues in a third-line appellate attack if a defendant can choose to make it his first- or second-line appellate attack? Because "[t]he interrelationship between CR 60.02 and RCr 11.42 was carefully delineated in *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983)." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). "A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware,

or should be aware, during the period when the remedy is available to him." *Ibid.*

A defendant cannot pick and choose an order in which to file his or her post-conviction claims in an effort to avoid procedural bars. The CR 60.02 motion is the final post-conviction motion and is reserved only for issues that could not be raised on direct appeal or in RCr 11.42. "In summary, CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *McQueen*, 948 S.W.2d at 416. Thus, DeShields's Motion to Amend Sentence, which contained an issue properly raised under RCr 11.42, should have been summarily denied as procedurally improper if it were reviewed as a CR 60.02 motion.

Furthermore, DeShields asked the court only to vacate or "remove" the conditional discharge due to the alleged constitutional violation. (TR 86). He did not claim any error so grievous as to void his entire judgment (in spite of his current assertion before this Court, *see* Aplt's brf. at 7). *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (". . . he must affirmatively allege facts which, if true, justify *vacating the judgment* and further allege special circumstances that justify CR 60.02 relief.") (emphasis added). It is highly doubtful that DeShields, having nearly served out his sentence, wants his judgment voided so he is returned to square one.

DeShields's motion also did not state there were any extraordinary circumstances warranting CR 60.02 relief. DeShields simply made a collateral claim of constitutional error and requested the "remov[al of] the conditional discharge portion of [the] sentence." (TR 86). DeShields did not ask the court to render his entire judgment void, nor did he allege special circumstances to justify CR 60.02 relief.

Furthermore, though given two opportunities -- one of which was while he was represented by counsel -- DeShields withheld his express intentions regarding his post-conviction rule choice. DeShields did not claim he had filed a CR 60.02 motion when he filed his Motion to Amend Sentence, nor did he claim he had filed a CR 60.02 motion when he was represented by counsel and filed his Appellant's Brief at the Court of Appeals. In fact, his appellant's brief did not state his motion was raised under *any* post-conviction rule. DeShields did not even claim the abuse-of-discretion standard of review applied on appeal, as it would in a CR 60.02 appeal. *Winstead v. Commonwealth*, 327 S.W.3d 479, 488 fn. 27 (Ky. 2010).

Instead, DeShields claimed the issue was reviewed *de novo*, a standard of review for RCr 11.42 motions. *See Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) ("On appeal, the reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance.") (citations omitted).

Nor did DeShields allege special, extraordinary circumstances existed, another requirement of CR 60.02 relief. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (". . . a CR 60.02 movant must demonstrate why he is entitled to this special, extraordinary relief."). Instead, DeShields waited until his Reply brief at the Court of Appeals to first raise any allegation that his motion was a CR 60.02 motion.

That was the first time DeShields made known his alleged intention to file his motion under CR 60.02. Prior to then, DeShields's issue, his requested relief, and his standard of review all pointed to an RCr 11.42 motion. Accordingly, the Court of Appeals did not err by reviewing it as an RCr 11.42 motion.

Should this Court disagree and find DeShields filed a CR 60.02 motion, the trial court's order should be affirmed because DeShields admits this issue could have been raised in an RCr 11.42 motion. *Gross*, 648 S.W.2d at 857 (holding a defendant is "foreclose[d] . . . from raising any questions under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings.").

III. DeShields was not denied a "Fair Warning."

DeShields's substantive argument has been a moving target. At the trial court he claimed the revocation procedures for conditional discharges violated *Apprendi* and the Double Jeopardy Clause. At the Court of Appeals he claimed a "Fair Warning" violation under the Due Process clause. (Ct. of

App. Appellant's Brf. at 8). Now he claims a violation of both "Fair Warning" and the Ex Post Facto Clause. (Aplt's Brf. at 19).

A. Two cans of worms.

DeShields's claim on discretionary review is so far removed from the trial court claim that it should be denied. A defendant cannot "'feed one can of worms to the trial judge and another to the appellate court.'" *Grundy v. Commonwealth*, 25 S.W.3d 76, 84 (Ky. 2000) (quoting *Kennedy v. Commonwealth*, 544 S.W.2d 219 (1977)). Here, the trial court ruled on DeShields's *Apprendi* and Double Jeopardy claims. DeShields has abandoned – not evolved – the claims presented to the trial court. Having fed one can of worms to the trial court and another to the appellate courts, DeShields's appeal should be summarily denied.

B. Fair Warning claim.

Alternatively, DeShields's latest claim fails under the law. "A 'fair warning' violation occurs '[w]hen a[n] . . . unforseeable state-court [sic] construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect [being] to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.'" *Walker v. Commonwealth*, 127 S.W.3d 596, 603 (Ky. 2004) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964) (alterations in original)). In *Bouie* the state supreme court interpreted the

trespass statute, which explicitly prohibited only *entry* onto lands of others, to also prohibit *remaining* on the premises of another after being told to leave. 378 U.S. 349-350. Prior to this judicial interpretation of the statute, two African-American men had conducted a sit-in at a restaurant after being told to leave. *Id.* at 348. The United States Supreme Court found the men were not given "fair warning" that their past actions of *remaining* in the restaurant would constitute a crime under the statute that only criminalized *entry*. Thus, the men were denied due process of law because they were not given fair warning that their past acts were criminal.

DeShields's "fair warning" claim fails under *Bouie*. "'[T]he touchstone [for determining fair warning] is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.'" *Tharp v. Commonwealth*, 40 S.W.3d 356, 362 (Ky. 2000) (quoting *United States v. Lanier*, 520 U.S. 259, 267 (1997)). At the time DeShields committed his sex crimes, he had fair warning that his acts constituted a crime and would be subject to a five-year conditional discharge. *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010) did not change the fact that sex crimes are subject to a five-year conditional discharge that is supervised by Probation and Parole under the conditions set by the executive branch.[1] The only change was a procedural change in how

[1] Because Fair Warning claims only concern state-court changes to the law, the legislative changes to the statute and regulations are discussed below in

revocation proceedings would occur. This procedural change does not alter the fact that DeShields had fair warning about the criminal penalty of his actions, the length of sentence he would receive, the length of the conditional discharge, or the terms of that conditional discharge. Thus, DeShields had a "fair warning" that his sex crimes would be subject to an additional five-year post-parole supervision. His fair warning claim must fail.

C. ***Ex Post Facto* claim.**

A "fair warning" violation occurs under the Due Process Clause when a judicial interpretation of a statute increases what past acts are subject to criminal penalties. In contrast, when the state legislature changes a statute so as to increase criminal punishment for past acts, the legislative changes may violate the *Ex Post Facto* clause of the United States Constitution, Article I, Section 10, Clause 1. The *Bouie* Court noted the difference between actions arising under the Due Process Clause and the *Ex Post Facto* Clause:

> If a state legislature is barred by the Ex Post Facto Clause from passing such a law [that makes criminal an action done before the passing of the law, or that aggravates a crime or makes it greater than it was when committed], it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

378 U.S. at 353-354. *See also Rogers v. Tennessee*, 532 U.S. 451, 460 (2000) ("The *Ex Post Facto* Clause, by its own terms, does not apply to courts."). Under the *Ex Post Facto* Clause, one must prove the statutory or regulatory

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the proper *Ex Post Facto* Clause context.

changes created a "sufficient risk of increasing the measure of punishment attached to the covered crimes." *California Dept. of Corrections v. Morales*, 514 U.S. 499, 509 (1995). DeShields cannot make such a claim.

First, DeShields is again feeding one can of worms to the trial court and another to this court by raising an *Ex Post Facto* claim here and a Due Process/*Apprendi* claim below. (TR 82-87). The trial court did not rule on an *Ex Post Facto* claim as it was not before the trial court. (TR 98). His novel claim should be dismissed.

Second, DeShields claim fails substantively. KRS 532.043 provides that following release from parole or "incarceration upon expiration of sentence," certain sex offenders are subject to an additional five-years of conditional discharge. Effective March 3, 2011, KRS 532.043 was amended *in toto* to rename "conditional discharge" to "postincarceration supervision." Additionally, KRS 532.043(4)-(5) were amended as follows:

> (4) Persons under *postincarceration supervision* ~~conditional discharge~~ pursuant to this section shall be subject to the supervision of the Division of Probation and Parole *and under the authority of the Parole Board.*
>
> (5) If a person violates a provision specified in subsection (3) of this section, the violation shall be reported in writing *by the Division of Probation and Parole. Notice of the violation shall be sent to the Parole Board to determine whether probable cause exists* ~~to the Commonwealth's attorney in the county of conviction. The Commonwealth's attorney may petition the court~~ to revoke the defendant's *postincarceration supervision*

~~conditional discharge~~ and reincarcerate the defendant as set forth in KRS 532.060.

(italics indicate additions, strike-throughs indicate deletions).

These changes were enacted in response to this Court's opinion in *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010). In *Jones*, two defendants serving KRS 532.043 conditional releases challenged the constitutionality of the statute under the separation of powers doctrine. *Id.* at 295-296. A conditional discharge is typically an unsupervised release granted by the trial court at sentencing. *Id.* at 298. The conditional discharge as used in KRS 532.043 operated differently, however, establishing a "statutory scheme [that] is more akin to parole or an extension of parole." *Ibid.*

> With parole, the Parole Board (executive branch) sets the conditions of release, as well as the terms of supervision, *after* a prisoner has been sentenced by the court and has begun serving his or her sentence. Parole suspends the execution of a sentence.
>
> "Parole recognizes those justifications [for incarceration] existed at sentencing and there now exists a change of circumstances or a rehabilitation of a prisoner." "[T]he power to grant parole is a purely executive function."
>
> Upon breach of a condition of parole, the parole officer seeks revocation. An administrative hearing is held before the Parole Board. Appeals are then made to the Circuit Court, as with other executive, administrative appeals.

Jones, 319 S.W.3d at 298 (footnotes omitted, paragraph breaks added for readability).

The statute provided the executive branch to set the conditions of the conditional discharge and to supervise the conditional discharge. *Ibid. See also* KRS 532.043(3) and (4). The problematic subsection of the statute, KRS 532.043(5), "impose[d] upon the judiciary the duty to enforce conditions set by the executive branch." *Jones*, 319 S.W.3d at 299. "This statutory mixture of the roles of the judiciary within the role of the executive branch is fatal to the legislative scheme." *Ibid.* Subsection 5 thus "runs afoul of the separation of powers doctrine when *revocation* is the responsibility of the judiciary." *Jones*, 319 S.W.3d at 299-300 (emphasis in original). This holding was limited only to Subsection 5:

> Finally, we note that our ruling is limited to KRS 532.043(5). Only the revocation procedure established by this subsection is unconstitutional. Because subsection (5) is severable from the remainder of the statute, the statute's other provisions remain in force.

Id. at 300 (footnote omitted). Thus the other subsections remained in effect and required certain sexual offenses to be: subject to a five-year period of postincarceration supervision; subject during the postincarceration supervision to all orders specified by the Department of Corrections; and subject to the supervision of Probation and Parole during the postincarceration supervision.

The General Assembly then amended the statute, as shown above, to alter the revocation procedure. Now revocation of the postincarceration

supervision period is performed by the Parole Board instead of the circuit court.

i. **Not an *Ex Post Facto* claim.**

Initially, DeShields's claim must fail because amendments to KRS 532.043(5) are not *ex post facto* laws. DeShields is subject to the same five-year conditional discharge/post-incarceration supervision that he was subject to when he committed his crimes. The only change is a procedural change in how revocation proceedings are conducted:

> The 2011 amendment to KRS 532.043(5) merely established a new procedure for adjudicating the revocation of conditional discharge. It did not create a new crime or enhance an existing crime, it did not in itself enhance the penalty for an existing crime, and it did not in any way alter the rules of evidence in regards to the offense charged.

Rider v. Commonwealth, 460 S.W.3d 909, 911 (Ky. App. 2014).

The law has provided for a five-year conditional discharge from the day that DeShields committed his sexual crimes. That conditional discharge was always subject to revocation. Nothing has changed about the length of the sentence or the fact that it is subject to revocation. Thus, the legislature has not "retroactively alter[ed] the definition of crimes or increase[d] the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990).

Only the procedures for revocation have changed inasmuch as one is now before an ALJ and the Parole Board rather than a circuit judge. This

procedural change is not an *Ex Post Facto* violation. DeShields's claim should be denied.

ii. Not an *Ex Post Facto* violation.

In addition to not being an *Ex Post Facto* claim, DeShields's claim does not demonstrate an *Ex Post Facto* violation. The only way in which a procedural change in the law could violate the *Ex Post Facto* Clause of the United States Constitution is if it "inflicts a greater punishment, than the law annexed to the crime, when committed[.]" *Calder v. Bull*, 3 U.S. 386, 390, 3 Dall. 386 (1798). When the "retrospective change results in increased punishment[,]" either by "'alter[ing] the definition of criminal conduct or increas[ing] the penalty by which a crime is punishable[,]'" the *Ex Post Facto* Clause may be violated. *Martin v. Chandler*, 122 S.W.3d 540, 547 (Ky. 2003) (quoting *California Dept. of Corrections v. Morales*, 514 U.S. 499, 506 n.3 (1995)).

Ferreting out the metes and bounds of "increased punishment" has required years of case law by the United States Supreme Court. Analysis of three seminal cases deciding alleged *Ex Post Facto* violations of laws altering the terms of discretionary parole or early release demonstrate the changes to Subsection (5) are not constitutionally infirm.

In *Weaver v. Graham*, 450 U.S. 24 (1981), the Florida legislature changed good-time credit laws to grant fewer days of credit each month for all

inmates. *Id.* at 26-27. The change in the law occurred both after Weaver had committed murder and after he had been sentenced for second-degree murder. *Id.* at 25-26. Because the parole board applied the new calculation of good-time credits to Weaver, Weaver was required to serve two additional years, or approximately 14 percent of his original 15-year sentence. *Id.* at 27. Weaver claimed the change in law violated the *Ex Post Facto* Clause.

The United States Supreme Court agreed. In analyzing its past decisions, the Court noted "two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective . . ., and it must disadvantage the offender affected by it." *Id.* at 29. Applying this standard the Court found the change in law "substantially alter[ed] the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment.'" *Id.* at 33 (quoting *Dobbert v. Florida*, 432 U.S. 282, 293-294 (1977)). Inmates who followed prison rules received fewer monthly good-time credits under the new statute. "By definition, this reduction in gain-time accumulation lengthens the period that someone in petitioner's position must spend in prison." *Id.* at 33. Thus, an *Ex Post Facto* violation occurred.

In subsequent decisions, *Weaver*'s holding was narrowed significantly. *See Martin v. Chandler*, 122 S.W.3d 540, 547 (Ky. 2003) ("The United States Supreme Court, however, has subsequently identified the 'disadvantaged'

language as dicta and has framed the appropriate inquiry as whether a retrospective change results in increased punishment[.]"). DeShields ignores the fact that the "disadvantaged" language is mere dicta, instead proffering it as the standard for characterizing a law as an *Ex Post Facto* violation. Aplt's Brf. at 20. As is shown, the standard is much higher.

In *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), parole statutes in effect when Morales was convicted of multiple murders provided that his sentence be reviewed annually by the parole board. While in prison, however, the statutes were changed to permit the parole board to defer Morales for up to three years "if it found no reasonable probability that respondent would be deemed suitable for parole in the interim period." *Id.* at 502-503, 507. At his 1989 parole hearing, Morales was deferred until 1992. *Id.* at 503.

Morales claimed this procedural change in his parole hearings violated the *Ex Post Facto* Clause. *Id.* at 504. The Court noted that unlike the law in *Weaver*, which "had the purpose and effect of enhancing the range of available prison terms," the California statute in *Morales* relieved the parole board from costly and time-consuming parole hearings for prisoners "who have no reasonable chance of being released." *Id.* at 507. The California statute did not change the sentencing range of the applicable crimes, but "simply 'alter[ed] the method to be followed' in fixing a parole release date

under identical substantive standards." *Id.* at 508. Thus, it did not violate the *Ex Post Facto* Clause.

The Court rejected the "expansive view" that any statute that has a "conceivable risk of affecting a prisoner's punishment" violates the *Ex Post Facto* Clause. *Ibid.* "Respondent's approach would require that we invalidate any of a number of minor (and perhaps inevitable) mechanical changes that might produce some remote risk of impact on a prisoner's expected term of confinement." *Ibid.* The Court noted this approach would result in judicial "micromanagement of an endless array of legislative adjustments to parole[.]" *Ibid.* It held that it is a matter of "degree" whether a legislative adjustment sufficiently transgresses the constitutional prohibition. *Id.* at 509. That degree cannot be defined by a "single 'formula[.]'" *Ibid.* However, when:

> [t]he amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* clause.

Ibid.

This holding was expanded in *Garner v. Jones*, 529 U.S. 244 (2000). There, a Georgia law in place when Jones was sentenced required that all inmates serving life sentences first see the parole board after seven years, and if denied parole, every three years thereafter. *Id.* at 247. The law was subsequently changed to permit the parole board to order reconsideration up

to eight years later instead of three. *Ibid.* In Jones's case, the parole board denied parole after seven years and set Jones's next parole hearing date eight years in the future. *Ibid.* However, because the United States Court of Appeals for the Eleventh Circuit in *Akins v. Snow*, 922 F.2d 1558 (1991) found an *Ex Post Facto* violation in a similar case, the parole board reinstated the three-year parole reconsideration in Jones's case. *Ibid.* Jones was denied parole twice under the three-year scheme. *Id.* at 247-248.

Then in light of the *Morales* opinion, which rejected the *Akins* rationale, the parole board reinstated the eight-year reconsideration period. *Id.* at 248. Jones then brought a 42 U.S.C. § 1983 action against the parole board claiming an *Ex Post Facto* violation. *Ibid.* The District Court entered summary judgment for the parole board, finding the statute only relieved the parole board of the necessity of holding parole hearings for prisoners who have no reasonable chance of being released, permitted parolees to petition the parole board for a new hearing due to a change in circumstances, and created "only the most speculative and attenuated possibility" of increasing a prisoner's punishment. *Ibid.*

The Court of Appeals reversed, finding a greater number of prisoners were affected by the new law than were affected in *Morales*, and that "'[m]uch can happen in the course of eight years to affect the determination than an inmate would be suitable for parole.'" *Id.* at 249 (quoting *Garner v. Jones*, 164

F.3d 589, 595 (11th Cir. 1999)). The United States Supreme Court granted *certiorari* and reversed.

The Court's analysis began by "emphasizing that not every retroactive procedural change creating a risk or affecting an inmate's terms or conditions of confinement is prohibited." *Garner*, 529 U.S. at 250. "The controlling inquiry . . . [is] whether retroactive application of the change in . . . law created 'a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Ibid.* (quoting *Morales*, 514 U.S. at 509).

Here, the Georgia parole law did not sufficiently increase the measure of punishment to be facially dispositive of an *Ex Post Facto* violation. Even though the Georgia law permitted extensions of parole reconsideration by five years (instead of two), covered all prisoners serving life sentences (instead of just multiple murderers), and afforded inmates fewer procedural safeguards (i.e., no formal hearings in which counsel can be present), the Court reiterated, "The question is whether the amended Georgia Rule creates a significant risk of prolonging respondent's incarceration." *Garner*, 529 U.S. at 251. "The requisite risk is not inherent in the framework of [the amended Georgia rule], and it has not otherwise been demonstrated on the record." *Ibid.*

The Court noted "[t]he States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." *Garner*, 529 U.S. at 252.

In light of this case law, no *Ex Post Facto* Clause violation occurred when the General Assembly amended KRS 532.043, and the Department of Corrections promulgated regulations consistent therewith. DeShields principally complains that because he "may" elect to waive his right to an attorney during a postincarceration supervision revocation proceeding, and because some of the procedures are different under the new statute and regulations, he may be re-committed if he violates the terms of his postincarceration supervision. Aplt's Brf. at 16. But he likely would have been re-committed if he violated the terms of his postincarceration supervision under the former procedure. His claim is too speculative to show to show a "significant risk" of inmates having their incarceration prolonged. *Morales, supra*; *Garner, supra*.

Unlike *Weaver* where all inmates automatically received less good-time credit and were thus automatically subject to a longer imprisonment sentence and a "significant risk" of injury was apparent, the instant case aligns with *Morales* and *Garner*, where parole procedures changed but did not automatically subject any prisoner to a longer sentence.

The instant statutory and regulatory changes only affect a small subset of an even smaller subset of inmates – only those sex offenders who

violate or are accused of violating the terms of their postincarceration supervision. The changes do not automatically subject any offender to a longer imprisonment sentence, as the good-time credit changes did in *Weaver*. The changes still provide for revocation proceedings during which offenders have the right to request and have counsel present. *See* 501 KAR 1:070 § 1(11) ("Any party appearing before an administrative law judge of the Kentucky Parole Board may be represented by counsel if he so desires.") (Appendix 1); KYPB 30-01 (Appendix 2); CPP 27-19-01 (Appendix 3); CPP 27-30-02(II)(H)(6) (violations of sex offender postincarceration supervision governed by CPP 27-19-01). Offenders still receive the full "minimal due process rights" required during a parole revocation hearing. *Gamble v. Commonwealth*, 293 S.W.3d 406, 413 (Ky. App. 2009). *See also Morrissey v. Brewer*, 408 U.S. 471, 488 (1972). And in some respects they receive more procedural rights under the new regulations than they received in circuit court.

For example, instead of one revocation hearing before a single judge, the offender now receives a preliminary revocation hearing before an ALJ where witnesses are sworn under oath and evidence is presented, and, if probable cause is shown at that hearing and the case is referred to the Parole Board, the majority of the Parole Board must agree with the ALJ's findings and issue a warrant and bring the offender before the Parole Board for a "final sex offender postincarceration supervision revocation hearing." 501

KAR 1:070 §1(1)-(6). At that final hearing the defendant may request to present additional evidence and may receive a special hearing. *Id.* at §3. The Parole Board then votes whether to revoke, and if it decides to revoke, the defendant may petition the Board for reconsideration of the decision. *Id.* at §4. These procedures, though slightly different than a revocation hearing in circuit court, do not facially demonstrate that more prisoners will serve prolonged incarceration than they would have under the former procedure.

To constitute an *Ex Post Facto* law, "the court must first determine whether a change in law or regulation creates a significant risk of increased punishment for the inmate." *Stewart v. Commonwealth*, 153 S.W.3d 789, 793 (Ky. 2005) (citing *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995)). DeShields cannot make this *prima facie* showing. Because the change does not show an increased risk on its face, the defendant must demonstrate "'that its retroactive application will result in a longer period of incarceration than under the earlier rule.'" *Ibid.*

As shown above, the procedural changes are minimal. A defendant still has a right to counsel, still has a right to a hearing, still has a right to present evidence and cross-examine witnesses, and still has a right to detached and neutral arbiter. These changes are to familiar -- not unfamiliar -- territory, as the revocation procedures for post-incarceration supervision closely mirror those for parole revocation. *Compare* 501 KAR 1:040, *with* 501

KAR 1:070. These minimal procedural changes do not demonstrate that more defendants are at a significant risk of increased punishment, a requisite showing for an *Ex Post Facto* finding. *Stewart*, *supra*.

Indeed, DeShields has been aware that he has to serve a five-year conditional discharge from the day he entered a guilty plea. He was aware he was subject to revocation of that conditional discharge. He was aware he would go to prison and then be released either on parole first and conditional discharge second, or serve out his prison sentence and be released on conditional discharge. Nothing about his punishment has increased.

Other than make a bare assertion that his punishment may increase, DeShields can prove no more. He readily admits he cannot provide any statistics or facts to prove his claim. (Aplt's Brf. at 21, fn. 3) ("it is an impossible task to collate the relevant statistics."). He only relies upon extreme hypotheticals – "speeding tickets" forming the basis of a revocation proceeding (Aplt's Brf. at 13) -- and rampant speculation to support his claims. Neither suffice as hard evidence of a significant risk of increased punishment.

As the United States Supreme Court cautioned, courts must avoid the "'micromanagement of an endless array of legislative adjustments to parole and sentencing procedures.'" *Garner*, 529 U.S. at 252 (quoting *Morales*, 514 U.S. at 508). "The States must have due flexibility in formulating parole

procedures and addressing problems associated with confinement and release." *Garner*, 529 U.S. at 252.

DeShields's novel claim, raised for the first time on appeal, fails for multiple reasons. The trial court's order denying DeShields's motion should be affirmed.

CONCLUSION

DeShields's claim should be reversed and remanded for dismissal because his issue is not ripe. Alternatively, DeShields's un-labeled and un-characterized motion was properly characterized as an RCr 11.42 motion and analyzed accordingly. Furthermore, his substantive issue was properly denied for myriad reasons expressed above.

WHEREFORE, for the foregoing reasons, the Commonwealth respectfully requests the Court AFFIRM the Court of Appeals's opinion.

Respectfully submitted,

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